SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1250

AMERICAN GUILD OF VARIETY ARTISTS,
Petitioner,

against

WILLIAM SMITH, doing business as SMITH ENTERTAINMENT AGENCY and as SMITH & DALE CIRCUS,
Respondent.

PETITIONER'S SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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POINT I

Section 6 of the Norris-La Guardia Act may be considered at this time.

Respondent's contention in his brief in opposition to this petition for writ of certiorari that Section 6 of the Norris La Guardia Act has not been raised below and cannot be raised at this time is without merit. The Supreme Court of the United States in its order of reversal and remand in this very case 384 U.S. 30 (1966) itself, on its own initiative, raised the question of the application of that statute when it stated:

> "The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated

> and the case is remanded to that Court for further proceedings in light of *United Mine Workers of America* v. *Gibbs*, No. 243, October Term, 1965, decided March 28, 1966."

In *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1940), the Supreme Court stated:

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.
>
> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

The *Gibbs* case was decided March 28, 1966, after the judgment of the United States Court of Appeals for the Eighth Circuit was entered (August, 1965) reversing the judgment of the United States District Court for the District of Minnesota (which directed a verdict in favor of petitioner on one cause of action and granted judgment N.O.V. for the petitioner on a second cause of action.)

It has been held by the Supreme Court in the past that questions of law not raised in a lower court may nevertheless be raised on appeal where an intervening statute or judicial decision has come between a final judgment in a lower Federal Court and the review of that decision by this Court. *United States* v. *The Schooner Peggy*, 1 Cranch 103; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U.S. 503.

When the Supreme Court asked the United States Court of Appeals for the Eighth Circuit to consider this case in the light of the *Gibbs* case, it necessarily *held* that 29 U.S.C. § 106 can be brought into this case on appeal.

POINT II

The United States Court of Appeals for the Eighth Circuit substantially ignored Part II of the opinion in the *Gibbs* case.

In petitioner's brief in support of its petition for writ of certiorari, it is pointed out rather clearly that the United States Court of Appeals for the Eighth Circuit in its decision on remand from this Court ignored a compelling mandate of this Court set forth in *Gibbs*; namely, that the scope of state remedies in area of labor law is pre-empted by federal labor legislation and for a state to rise above federal pre-emption of this field of labor law, action inimical to the state's interest must be clearly present and that action is violence. In the instant case, as in *Gibbs*, violence or threat of violence was practically non-existent and clearly not of a degree as to bring into play state remedies in this pre-empted area of law.

Conclusion

Section 6 of the Norris La Guardia Act, 29 U.S.C. § 106, is a yardstick by which evidence presented in cases involving labor disputes may be measured either by the trial court or the appellate court, it is not an affirmative defense, but a rule of evidentiary law which maintains throughout the case and may be raised at any time. The violence attendant to the picketing in the instant case was totally non-existent so that state remedies cannot be invoked.

The Eighth Circuit Court of Appeals erred in holding that Section 6 of the Norris La Guardia Act, 29 U.S.C. § 106, could not be raised on appeal and it erred in not reviewing and applying the tests for the invocation of state remedies set forth in Part II of the *Gibbs* case.

I therefore submit that the petition should be granted.

Respectfully submitted,

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